Supreme Court, U.S.
FILED
OCT 29 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-156

FERNANDO R. ESCUTE,

Petitioner,

vs.

GERARDO DELGADO, WARDEN, PENITENTIARY OF PUERTO RICO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

RONALD L. CARLSON,
College of Law,
University of Iowa,
Iowa City, Iowa 52240,

SANTOS P. AMADEO,
P. O. Box 21883,
University Station,
Rio Piedras,
Puerto Rico 00931,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-156.

FERNANDO R. ESCUTE,

Petitioner,

vs.

GERARDO DELGADO, WARDEN, PENITENTIARY OF PUERTO RICO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

Petitioner herein respectfully moves this Court for an order granting rehearing in this cause. Petition for writ of certiorari was denied on October 12, 1971. As grounds for this Petition for Rehearing, petitioner states the following:

1. THE DECISION OF THIS COURT IN COOLIDGE v. NEW HAMPSHIRE, 403 U. S. 443.

Approximately six weeks after the filing of the Petition for Certiorari in the instant case, this Court decided *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022. The *Coolidge* case made clear the need for persons invested with judicial authority to be neutral and detached. It

appears without dispute that the youth involved in this case was arrested and interrogated by the police. After an interrogation of several hours, the young man was taken before a prosecutor who was also a committing magistrate. The prosecutor/magistrate proceeded to swear the defendant as a witness and take his testimony. Whatever label may have been attached to it, it seems clear that the proceeding before the prosecutor constituted a probable cause hearing. Under Puerto Rico law at the time, the prosecutor was charged with the responsibility of holding such preliminary hearings. And while the record may not be entirely clear on the following point, there are certain indications that bail was set. In any event, there appears no viable question of the hearing prosecutor's authority under then extant Puerto Rico law to act in a judicial capacity and release the defendant on a finding of no probable cause, to find probable cause and release him on a low bail, or to fix bail in a high amount. *This judicial functionary before whom the defendant was forced to appear was the same man who was prosecuting the accused.*

The Court of Appeals below answered these assertions by stating, in part: "We are inclined to doubt the ability of a defense lawyer to persuade a magistrate to lower the bail when the magistrate is also the prosecutor." (See page A13 of the Appendix to petitioner's Petition for Certiorari.). This is precisely the petitioner's point. It is terribly difficult to achieve a lowered bail—indeed, it is difficult to accomplish any of the things possible before a neutral and detached magistrate—when the magistrate is wearing two hats.

Coolidge v. *New Hampshire* was handed down some six weeks after the Petition for Certiorari in this matter was filed. *Coolidge*, with its rule barring governmental employment of individuals as prosecutors and magistrates at the same time, made clear a point which seemed outstanding

when the Petition for Certiorari herein was prepared. For *Coolidge* established that a *per se* defect is created when magisterial power is exercised by a prosecuting agent. *Coolidge* adopts "a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances." 91 S. Ct. at 2029. Petitioner hastens to point out that the apparatus created by the state in the instant case caused contact by the accused with a prosecutor who was at the same time a hearing magistrate, while in *Coolidge* the state scheme allowed a prosecutor to act as a magistrate to issue search warrants. The result of the scheme was exactly the same; only the type of evidence seized was different. In this case, oral evidence was obtained from the accused; in *Coolidge,* physical evidence. The differences between the two cases seems minimal, the similarities remarkable. In *Coolidge,* under New Hampshire law in force at the time, the attorney general could act as a justice of the peace, and justices of the peace were authorized to issue search warrants (repealed 1969). Here, in *Escute,* prosecuting attorneys could act as hearing magistrates, and were authorized to fix bail, issue warrants of arrest, and determine probable cause (repealed 1952).[1]

The Respondent attempts to answer these arguments by labeling the proceeding (wherein the accused was sworn as a witness by the magistrate) something other than a hearing. Respondent urges that the District Attorney was acting in an "investigative" role when he put the accused under oath and took his testimony. This Court has long and wisely applied the "rose by any other name" approach to

1. See respondent's admission to this effect cited at the top of page 10, Petition for a Writ of Certiorari. See also page 2 of the same Petition. With commendable candor, respondent in this Court appears to acknowledge that which appears from the record, the fact that prosecutors were invested with judicial power. "The statute authorizing this procedure is set out on page 2 of the Petition. It has since been repealed." Respondent's Brief in Opposition (1971), page 3, n. 1.

such arguments. For example, in *Smith* v. *Bennett,* 365 U. S. 708 (1961) and *Long* v. *District Court,* 385 U. S. 192 (1966), the Court settled that prisoners could not be denied certain fundamental rights in habeas corpus proceedings simply by states labeling such proceedings as civil matters. By the same token, the government here cannot avoid the implications of the *Coolidge* rule by saying the blended roles of prosecutor and magistrate did not unconstitutionally coalesce when young Rivera Escute was brought before the prosecutor and sworn as a witness to give testimony. Could New Hampshire as easily have avoided the impact of the *Coolidge* rule simply by asserting that the Attorney General was acting in his magisterial capacity when he issued his own search warrant? See 91 S. Ct. at 2028-29.

The recently decided case of *Coolidge* v. *New Hampshire* appears to control the instant Petition. Among other points, Justice Stewart's opinion in *Coolidge* brings out the guiding principle: "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprises' which must rightly engage their single minded attention." 91 S. Ct. at 2029-30. The *per se* invalidation rule of *Coolidge* dictates that the governmental scheme involved here be similarly struck down.

CONCLUSION.

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,

RONALD L. CARLSON,
College of Law,
University of Iowa,
Iowa City, Iowa 52240,
Attorney for Petitioner.